STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EDWARD ARNEY,

Defendant-Appellant.

UNPUBLISHED
March 20, 2003

No. 236875
Macomb Circuit Court
LC No. 01-000161-FC

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and was sentenced to fifteen to fifty years' imprisonment. He appeals as of right. We affirm defendant's conviction, but remand for resentencing.

Defendant argues that the legislative minimum sentencing guidelines range was incorrectly scored and that his trial counsel was ineffective for failing to independently calculate the sentencing variables and object to the errors.[1] We agree.

Defendant challenges the scoring of prior record variables 1 and 2 and offense variables 9 and 19. A sentencing court has discretion to determine the number of points to be scored, provided that record evidence adequately supports a particular score. Scoring decisions for which there is any supporting evidence will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Application of the statutory sentencing guidelines presents a question of law this Court reviews de novo. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002).

The prosecutor concedes that PRVs 1 and 2 were incorrectly scored and that defendant is entitled to be resentenced. Defendant had three prior felony convictions. These convictions were for breaking and entering with intent in 1986, larceny over $100 in 1987, and attempted breaking and entering in 1989.[2] Under MCL 777.19(3)(a), an attempted offense class D felony,

[1] Because the instant offense occurred after January 1, 1999, the legislative sentencing guidelines, MCL 777.1 *et seq*., apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000).

[2] Defendant's initial objection to the scoring of PRVs 1 through 5 based on the convictions being
(continued…)

such as breaking and entering with intent, becomes an offense class E felony. The trial court incorrectly relied on the Michigan Sentencing Guidelines Manual instructions for the procedure for scoring an attempted class D offense. The plain language of the MCL 777.19(3)(a) indicates that for an attempted class D offense, the offense class is class E. Therefore, defendant's prior conviction for attempted breaking and entering with intent should have been scored, as a class E offense, under PRV 2 instead of PRV 1. This changes the scoring of PRV 1 from fifty points to twenty-five points for one prior high severity felony conviction, and the scoring of PRV 2 from five points to ten points for two low severity felony convictions. Thus, defendant's correct PRV score is thirty-five points.

Although we have already concluded that defendant is entitled to resentencing on the basis of the errors in scoring the PRVs, we address defendant's additional claims of scoring error because they are likely to be raised on remand. Defendant argues that counsel was ineffective in not objecting to the scoring of OV 9, which should have been scored at zero points because only one person, Mrs. Hom, was placed in danger during the armed robbery. We disagree.

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

MCL 777.39(2)(a) directs the court to "[c]ount each person who was placed in danger of injury or loss of life as a victim." Mrs. Hom was alone at the cash register at the front counter of the restaurant when she was robbed. However, other persons were present in the restaurant at the time of the robbery. The waitress could see the robber through a screen between the rooms, and could also see the robber's gun. Mr. Hom came out of the kitchen in response to Mrs. Hom's screams just as the robber was leaving the restaurant. The robber could see both Mrs. and Mr. Hom through the glass window, and Mrs. Hom told Mr. Hom to hide so the robber would not shoot him through the glass. Although Mrs. Hom was the only person from whom the robber took money and to whom he showed the gun, the other persons present in the restaurant were also in danger of injury. See *People v Chesebro*, 206 Mich App 468, 473; 522 NW2d 677 (1994). Therefore, counsel was not ineffective in failing to object to the scoring of this variable and the court did not abuse its discretion in scoring OV 9 at ten points for two or more victims.

Defendant also argues that counsel was ineffective in failing to assert that OV 19 was incorrectly scored at ten points when it should have been scored at zero points because defendant did not attempt to interfere with the administration of justice. The prosecution argues that the trial court correctly concluded that defendant's drastic change in appearance between the offense

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over ten years old was properly rejected. Defendant's release date for the 1989 conviction was in March 1990, and the present offense was committed in November 1999. Therefore, the last prior conviction preceded the commission of the instant offense by only nine years and eight months. Since this conviction was properly considered, the prior two convictions in 1986 and 1987 were properly considered as well, because they did not predate the 1989 conviction by more than ten years. MCL 777.50.

and the trial was an attempt to interfere with the administration of justice.[3] This Court recently addressed the issue of the scoring of OV 19 in *People v Deline*, ___ Mich App ___; ___ NW2d ___ issued 12/27/02 (Docket No. 237307). In *Deline*, the trial court scored OV 19 at ten points because the defendant "interfered with or attempted to interfere with the administration of justice" based on the defendant's act of trying to evade being charged with drunk driving by trading places with the other occupant of the car. *Id*., slip op at 3. This Court offered the following definition and analysis of interference with justice:

> "Interference with" justice is equivalent in meaning to "obstruction of" justice. Garner, *A Dictionary of Modern Legal Usage*, (New York: Oxford Univ Press, 1995), p 611. Obstruction of justice "is a broad phrase that captures every willful act of corruption, intimidation, or force *that tends somehow to impair the machinery of the civil or criminal law*." *Id*. (Emphasis added). Interference with the administration of justice thus involves an effort to undermine or prohibit the judicial process by which a civil claim or criminal charge is processed. See, e.g., *People v Coleman*, 350 Mich 268; 86 NW2d 281 (1957) (affirming a conviction of obstruction of justice involving witness tampering).
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> Defendant here did not engage in any conduct aimed at undermining the judicial process by which the charges against him would be determined. Instead, he tried to evade those charges altogether by switching seats with his passenger and refusing an immediate blood alcohol content test. If we were to conclude that this evasive and noncooperative behavior justified the imposition of points under OV 19, that variable would apply in almost every criminal case. Defendants almost always seek to hide their criminal behavior and rarely step forward to offer evidence proving their guilt. [*Deline, supra*, slip op at 3.]

The prosecution asserts that defendant's drastic weight loss and change in head and facial hairstyles was a deliberate attempt to interfere with the administration of justice by preventing the witnesses from identifying defendant. However, although evidence was introduced through testimony from the officer in charge of the case and defendant's girlfriend that defendant had lost about one hundred pounds and had changed his hair styles, no evidence was introduced that this change in appearance amounted to a disguise or was for the purpose of preventing identification. The girlfriend testified only that defendant lost weight to look and feel better. Thus, while the prosecutor can seek to supplement the record on remand, on this record we find inadequate support for scoring ten points under OV 19.

Defendant further claims that additional instances of ineffective assistance of counsel require that he be granted a new trial.

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[3] In a footnote, the prosecution asserts that the trial court could have properly assessed the points on the basis of defendant's flight to Kentucky after the robbery. However, the court did not assess the points on that basis, and the record contains insufficient information to determine whether the timing and circumstances of defendant's departure would constitute an attempted obstruction under *People v Deline*, __ Mich App __; __ NW2d __ issued 12/27/02 (Docket No. 237307).

Defendant's claim that trial counsel was ineffective for failing to pursue a *Wade*[4] hearing to suppress the photo show-up and live line-up identifications fails because there is no indication in the record that the show-up or the line-up were impermissibly suggestive. Defendant argues that the show-up was suggestive because his picture had a different colored background than the other pictures and was placed in the center of the array. A photographic show-up is impermissibly suggestive when, based on the totality of the circumstances, it gives rise to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). However, mere differences in the composition of photographs have been held not to render a show-up impermissibly suggestive. *People v Kurylczyk*, 443 Mich 289, 304-305; 505 NW2d 528 (1993).

Defendant argues that the live line-up was impermissibly suggestive when the witnesses saw him in the district court courtroom before the line-up. However, defendant provided no corroboration that he was seen by the witnesses. At the *Ginther*[5] hearing, the officer in charge denied that he spoke to defendant in front of the witnesses. Trial counsel stated that he did not recall defendant telling him about the alleged incident and that the officer in charge assured him that the witnesses and defendant had not been in the courtroom together before the line-up. Although one witness testified at trial that she had seen defendant in the district court, she did not state when, and defendant did not call her to testify at the *Ginther* hearing. In addition, the witnesses viewed the robber's face for at least five minutes, they identified defendant from the photo show-up only a month after the robbery, and they identified defendant at the show-up and the line-up on the basis of his eyes, not any extrinsic factor. The totality of the circumstances does not show that the show-up or the line-up were impermissibly suggestive. *Kurylczyk, supra* 443 Mich at 306. Therefore, it is highly unlikely that the court would have suppressed the show-up or the line-up, and thus trial counsel's decision to abandon the meritless motion and use the show-up at trial to argue that the initial identification of defendant by the witnesses was faulty was not ineffective. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen by counsel was not effective does not constitute ineffective assistance of counsel. *Id.*

Defendant next argues that trial counsel was ineffective for failing to object to the prosecutor's use of the term "mug shot" during the trial. Generally, where a defendant has not taken the stand, testimony concerning a defendant's mug shot, or admission of the photograph itself, will impermissibly place his criminal record before the jury. *People v Embry*, 68 Mich App 667, 670; 243 NW2d 711 (1976). Here, trial counsel stated that he did not object to the use of the term because he did not want to draw attention to it. While this may be sound trial strategy where there is a fleeting reference to defendant's prior criminal history, the prosecutor's pervasive use of the term and deliberate elicitation of this evidence at defendant's trial warranted an objection. However, given the positive witness identification of defendant at trial, and no indication in the record that defendant was prejudiced by these remarks, we find no reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Toma, supra,* 462 Mich 302.

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[4] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

[5] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

We also reject defendant's claim that he was prejudiced by trial counsel's failure to move for a mistrial when he was seen by a juror while in the custody of two deputies and in handcuffs. Again, there is no record support that the alleged incident actually occurred, other than defendant's statements at the *Ginther* hearing. Trial counsel could not recall the incident or defendant telling him about it. Further, defendant did not call any witnesses to corroborate the incident or to testify to any prejudice. Trial counsel was not required to argue a meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Therefore, trial counsel was not ineffective for failing to move for a mistrial.

Finally, defendant argues that the trial court erred in denying defendant's motion for a mistrial when the jury was impermissibly exposed to extrinsic factors that prejudiced them against him. This Court reviews a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *Id.*

The guarantee of the right to a fair trial means that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002), quoting *Taylor v Kentucky*, 436 US 478, 485; 98 S Ct 1930; 56 L Ed 2d 468 (1978); US Const, Am XI and XIV; Const 1963, art 1, § 17. The Supreme Court in *People v Budzyn*, 456 Mich 77, 88-90; 566 NW2d 229 (1997), discussed the relevant inquiry regarding a claim of improper extrinsic influence on the jury:

> In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt. We examine the error to determine if it is harmless beyond a reasonable doubt because the error is constitutional in nature. The people may do so by proving that either the extraneous influence was duplicative of evidence produced at trial or the evidence of guilt was overwhelming. [Citations omitted.]

Defendant in the instant case has shown that the "mistaken identity" incident "created a real and substantial possibility that [it] could have affected the jury's verdict" because it "is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Budzyn*, *supra* at 89. However, the prosecution demonstrated that the error was harmless beyond a reasonable doubt by showing that the jury was not actually prejudiced by the incident. After the jurors notified the court that the incident had occurred, the court individually voir dired each juror to determine if the juror was prejudiced by the event. While four jurors stated that the incident was "suspicious," each juror assured the

court that they would remain fair and impartial. After assuring itself that the jurors could and would remain impartial notwithstanding the incident, the trial court instructed the jury to "leave it behind and let's look at the facts of the case and rule on this case, based upon the facts that have been presented through the evidence." We are satisfied that defendant suffered no prejudice from the incident and the court was not obliged to grant a mistrial. In addition, the evidence of defendant's guilt was overwhelming, based on positive witness identification at trial. Therefore, defendant was not denied a fair trial on the basis of extrinsic influences, and the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

We affirm defendant's conviction of armed robbery, but remand for resentencing. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Brian K. Zahra